

THE HONORABLE THOMAS S. ZILLY

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

EXPERIENCE HENDRIX, LLC, a Washington
Limited Liability Company, and **AUTHENTIC
HENDRIX, LLC**, a Washington Limited Liability
Company,

Plaintiffs,

v.

HENDRIXLICENSING.COM, LTD dba
HENDRIX ARTWORK and
HENDRIXARTWORK.COM, a Nevada
Corporation, and **ANDREW PITSICALIS** and
CHRISTINE RUTH FLAHERTY, husband and
wife,

Defendants.

No. C-09-0285 TSZ

DEFENDANTS' MOTION IN LIMINE

**NOTE ON MOTION CALENDAR:
APRIL 15, 2011**

COMES NOW Defendants Pitsicalis et al (hereafter "Pitsicalis") to move the Court in
limine to exclude various evidence from being offered by Plaintiffs (hereafter "Experience") at
trial.

I. Experience Is Judicially Estopped from Offering

Evidence Against Pitsicalis's Lack of Profits

Experience has made clear its intention to use Pitsicalis's profits as measure of
damages for his infringement. See Docket No. 81, Plaintiff's Response to Defendant's Motion
for Summary Judgment at 13-15. However, Experience previously relied on Pitsicalis's high

1 cost of doing business and resulting lack of net profits when bringing Experience's own Motion
 2 for Summary Judgment against Pitsicalis's counterclaims. See Docket No. 64, Plaintiff's Motion
 3 for Summary Judgment on Counterclaims at 8-9, 19¹. As a result of having already taken the
 4 position that Pitsicalis and his companies made no profit on Jimi Hendrix related items, they are
 5 barred from presenting and arguing evidence of the opposite by the doctrine of Judicial
 6 Estoppel.

7 The doctrine of Judicial Estoppel, sometimes referred to as the Doctrine of Preclusion of
 8 Inconsistent Positions, is invoked to prevent a party from changing its position over the course
 9 of judicial proceedings when such positional changes have an adverse impact on the judicial
 10 process. See Russell v Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990). The policies underlying
 11 preclusion of inconsistent positions are general consideration[s] of the orderly administration of
 12 justice and regard for the dignity of judicial proceedings. See id. Judicial estoppel is intended to
 13 protect against a litigant playing fast and loose with the courts. See id.

14 Here, Experience wishes to argue and present evidence exactly opposite to what it
 15 argued in its own summary judgment motion, namely that Pitsicalis was profitable. Any such
 16 evidence is barred by the doctrine of judicial estoppel and should be barred.

17 **II. Experience's Experts Should Be Excluded**

18 Experience has offered two witnesses to assist in the establishment of damages
 19 pursuant to Rule 26 (a)(2): Richard Yalch and Robert Cissel. Experience submitted an expert
 20

21
 22
 23 ¹ Experience Argued: "According to Pitsicalis's sworn testimony, none of the Defendants ever made a profit dealing
 24 in Jimi Hendrix related items...In fact, Hendrix Licensing was approximately \$100,000 in debt before Mr. Pitsicalis
 25 shut it down." Docket No. 64, Experience Motion for Summary Judgment of Defendant's Counterclaim at 13.
 26 "Pitsicalis has never made a profit..." See id. at 19.

1 disclosure for both witnesses on November 4, 2009. See Docket No. 33. No supplement has
2 been submitted. Both witnesses suffer from the same fatal flaw, namely that their opinions are
3 based on erroneous conclusions of law counter to the orders that are the law of this case. See
4 id.

5 ***Professor Yalch***

6 Professor Yalch's report is based on the damages to Experience's "brand" as the sole
7 source of Jimi Hendrix related merchandise. See id. at 5-7. He also refers to the false impression
8 caused by association with Jimi Hendrix song titles, which has also been found to not be
9 infringing activity by the Court in its most recent order. See id. Finally he offers no amounts of
10 damages or basis of such amounts in his reports except for Pitsicalis's gross receipts which
11 goes to the Pitsicalis excludable profits issue discussed above. Therefore, any testimony as to
12 amounts of actual damages, sums for corrective advertising, or other theory of damage have
13 not been disclosed as required by Rule 26 (a)(2). In sum, Professor Yalch's conclusions are not
14 grounded in the current state of the law concerning Jimi Hendrix publicity rights and trademarks,
15 or have not been disclosed pursuant to the rule, and as a result should be excluded. His
16 opinions are incomplete, erroneously based, irrelevant, and likely to confuse the jury.

17 ***Mr. Cissel***

18 Mr. Cissel's testimony is equally flawed and based on conclusions of law counter to the
19 law of this case. In short, Mr. Cissel's report is dedicated to stating that Pitsicalis's use of
20 Experiences marks are not entitled to the nominative fair use defense. See id. at 13-15. This is
21 simply not the case, as established through prior orders of the Court, most recently the Court's
22 order of February 8, 2011, wherein it found that the rulings from the preliminary injunction order
23 of July 2, 2009, concerning nominative fair use applied permanently. Therefore, as to use of the
24 words "Hendrix" and "Jimi Hendrix" in association with images and likenesses of Jimi Hendrix,
25 there is no infringement, and thus Mr. Cissel's opinions are based on wrongful conclusions of
26

1 law. As to the guitar bust logo, domain names, and authentic signature, it is also settled law,
 2 and unnecessarily cumulative. Mr. Cissel's report does not opine on damages at all, and as the
 3 legal issues (but for willfulness/intent as discussed below) are settled, his testimony has no
 4 place in a trial on damages.

5 Therefore, Pitsicalis moves that Experience's experts be excluded, because their reports
 6 disclose opinions not based on the current state of the law, and any supplement now would be
 7 untimely.

8
 9 **III. If Experience's Experts Are Excluded Experience Cannot**
 10 **Offer Competent Testimony on Actual Damages**

11 In the absence of expert testimony, Experience has no basis to introduce evidence of
 12 actual damages. Pitsicalis admits, and is even willing to stipulate, that Experience's revenues
 13 have most likely fallen during 2009-10. However, the Court can take judicial notice of the fact
 14 that the United States economy suffered the worst economic downturn since the 1930's during
 15 that period, and no lay witness offered by Experience can offer a causal link between Mr.
 16 Pitsicalis's activities and Experience's loss of revenue. Experience could have offered such
 17 testimony through a proper expert's report, but it did not, as discussed above. As a result.
 18 Pitsicalis moves the Court to bar any evidence of actual damages, be it for the purpose of
 19 money damages or corrective advertising, since it cannot be offered through competent expert
 20 testimony and would be mere speculation.

21
 22 **IV. Without Evidence of Damages, Any Other Evidence in Support of**
 23 **Experience's Consumer Protection Act Claim Is Moot and Should Be Excluded**

24 To prevail on a claim of violation of the Washington Consumer Protection Act, the
 25 Plaintiff must prove each and every element including damages. See Hangman Ridge v. Safeco
 26

1 Title, 110 Wn2d 778, 780 (1986). If Pitsicalis's above motions are well taken by the Court, then
 2 Experience cannot introduce any competent evidence of damages. Without damages,
 3 Experience's CPA claim will necessarily fail. The result is that any other evidence concerning
 4 the CPA, including if Mr. Pitsicalis engaged in a deceptive act, is moot and should be excluded.

5
 6 **V. Without a Consumer Protection Act Claim, Experience Can Only Seek Attorney's**
 7 **Fees Under the Lanham Act Which Is a Question of Law and Not Proper for the Jury**

8 If the above motions are all well taken, then Experience's sole outstanding claim would
 9 be for attorney's fees under the Lanham Act. The Lanham Act allows for an award of attorney's
 10 fees in "exceptional cases." See 15 U.S.C. § 1117(a). A trademark case is exceptional where
 11 the district court finds that the defendant acted maliciously, fraudulently, deliberately, or willfully.
 12 See Love v. Associated Newspapers Ltd, 611 F.3d 601, 615 (9th Cir. 2010). Interpretation of
 13 what constitutes an "exceptional case" is a question of law. See id. Thus, if all the above
 14 motions are well taken by the Court, the only outstanding issue is one of law², which eliminates
 15 the need for a jury and can be resolved by motion or bench trial as the Court sees fit.

16
 17 **Conclusion**

18 If all Pitsicalis's motions in limine as set forth above are well taken by the Court, then
 19 there is no need for a jury trial, and Pitsicalis would invite the Court to rule as such under its
 20 inherent powers to manage the case.

21
 22 _____
 23 ² To the extent any miscellaneous claims concerning use of "Hendrix Family," "Hendrix Bloodline," or other such
 24 issues until now un-raised but for in the complaint, the arguments for lack of evidence of damages also hold true.
 25 And any question of infringement can be resolved by motion, bench trial, or even possibly negotiation for addition
 26 to the permanent injunction since Pitsicalis has voluntarily abandoned their use.

1 SUBMITTED this 31st day of March, 2011.

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3 OSINSKI LAW OFFICES, P.L.L.C.

4 By /s/ Thomas T. Osinski Jr

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CERTIFICATE OF ATTORNEY

I certify that I, Thomas T. Osinski Jr., engaged in a conference with opposing counsel in good faith pursuant to CR 26(i) on March 30, 2011 concerning the above motions in Limine, but were unable to resolve the issue.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 31st day of March, 2011, at Tacoma, Pierce County WA.

OSINSKI LAW OFFICES, P.L.L.C.

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